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"May you live in interesting times." General remarks

1. The extreme diversity of legal systems in the world

The phenomenon called "surrogate motherhood" – in different forms and scopes – is present and developing in some of legal systems at the beginning of the 21st century. Taking into consideration the whole global perspective, no comparable moral or legal ground in this area can be identified. Due to this fact, creating common legal standards in this subject area or moving forward with wide-spread international unification of substantive law or rules regarding the recognition of effects of foreign laws seems neither real not necessary. Because of the progressively growing differences between foundations of national laws (e.g. interpretation of prohibition of human trafficking and exploitation, as well as legal concepts of maternity, paternity and child's origin) and because of the lack of competence of international bodies to regulate this issue comprehensively[1], no universal but rather limited co-operations within different circles of states representing similar values and axiological approaches is likely to take place. For these reasons, it is necessary to consider also the identities of national legal systems when discussing the global issues of surrogacy.

The contracts with "surrogate mother" are invalid and non-effective in most of states in the world. Sometimes they are even expressly prohibited and the persons

[1] As far as the transnational effects of national approach to legal parentage (maternity and paternity) were concerned – see: P. Mostowik, "Legislative activities of European Union versus fundamental principles of paternity and maternity in Member States", *International Journal of the Jurisprudence of the Family*, 2017 vol. 8, pp. 79–94, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3224049 (last accessed: 15 November 2018).

organizing and performing the procedure can be penalized. However, demands aiming to introduce such a legal solution to domestic law or to recognize effects of foreign law and civil status registration (which *de facto* leads to a similar substantive effect) have been noticed also in the last group of countries. The issue – especially from the *post factum* perspective of the child's care – has been recently debated before the European Court of Human Rights and is at present being discussed both by international organizations and at national level. The development of the "surrogacy" provokes a number – as evidenced by the title of the book – both legal and ethical problems.

In the introductory words to the book, I would like both to refer shortly to circumstances influencing the methodology and scope of studies contained in the book and to present personal substantive remarks about terminology and legal problems regarding to the surrogate birth.

The main content of this publication are texts written by international experts, which are presented in the ordered 'from general to specific' chapters. The monograph begins with the considerations on theory, philosophy and sociology of law, as well as with comparative remarks about different legal systems in the world. Subsequently, comments on the fundamental principles of law resulting from the constitutions of the reported states and international treaties on the protection of human rights are presented. Further detailed considerations include issues of private (substantive) law, including the relationship of the legal institutions present in some of countries and called worldwide 'surrogate motherhood' (de facto – its various types) to the legal principles of filiation (motherhood and fatherhood), personal status and adoption. The publication is crowned with considerations regarding the protection of fundamental principles of the legal order (*ordre public*) – first, through the solutions of domestic family law and private international law and civil procedure, and then concerning domestic criminal law and police cooperation. Thanks to the annex, the excerpts of interesting documents from various countries and organisations, as well as the updated review of information on practical aspects of the issue found in the press, can be acquainted.

2. *Stricte* surrogacy and other forms of "surrogate birth"

It is worth mentioning in the beginning, that the commonly used term "surrogate motherhood" is inaccurate. Firstly, as the "surrogate mother" is described not

the woman with legal status of mother, who takes care of the child, but a woman who was pregnant, gave birth to the child and contractually transferred the status of parent to another person. Secondly, in fact the last one could be described as "surrogate" in relation to the one pregnant and giving birth. Thirdly, it is doubtful, whether a scope of applicability of legal solutions adopted under this name in some of legal systems can be described as "surrogate". It is controversial, whether the delivering the child to constellations of people within conception and reproduction is in biological nature not possible (i.e. single persons or same-sex couples) can be logically described as "surrogate". It does not substitute the result possible in the nature but creates a specific legal fiction. Summarizing, it seems that the term alternative terms of "surrogate pregnancy" and "surrogate birth" are more accurate. After such proposals of mine and the discussion during the project these expressions are also used by some authors of contributions to describe the essence of the topic.

In my opinion, at the beginning of the 21st century, we need to create some additional terms and classifications that correspond to the changed reality and non-uniformity of procedures called "surrogate motherhood." The most important and useful classification seems to be the one based on the genetic origin of the child, the biological pregnancy and birth, as well as the legal status of father and mother (or parents 1 and 2) contracted under the classified laws. My proposal, for the purpose of discussion and my report, is the following distinction:

a) *stricte* surrogacy – a couple of woman and man contractually acquire the legal status of mother and father of a child (embryo) of their genetic origin, regardless the fact that another woman was pregnant and gave birth to it (e.g. a pure "renting of womb");
b) surrogacy *sensu largo* – a couple of woman and man contractually acquire the legal status of mother and father of a child (embryo) of genetic origin of one of them (the semen or ovum comes from another man or woman, e.g., from the so-called donor), regardless the fact that another woman was pregnant and gave birth and the fact that the child is partly genetically derived from another (fourth) person (e.g., "renting of womb" combined with *in vitro* fertilization using either an egg cell or sperm of the so-called donor);
c) *pseudo* surrogacy – another configuration of persons contractually acquires the legal status of mother or parents 1 and 2, although, biologically evaluating, such a constellation could not in general be ancestors of the same child (e.g., one person or a same-sex couple).

3. The problem of assumptions and progressive content of surrogacy

If somebody asked, whether people are aware what the content of current legal concepts called "surrogate motherhood" is, I would say: "No. Definitely not". In most legal systems, the observation *mater semper certa est*[2] is still valid, because the legal maternity is connected with a woman who has given birth to a child. However, in some legal systems biology (nature) has been *de facto* rejected as the foundation for family law. In my opinion, the current state of play in some of legal systems in the second decade of 21st century can be described by the following description: A doubtful route from "womb to rent" via "infertility treatment" with "donated" egg or sperm up to "asexual [really artificial] reproduction" of singles and homosexual couples.

The initial fundamental issue concerns the expression used widely in Anglophone literature and, because of this formal reason, it is featured in the title of the book. Are we, by saying surrogate "motherhood", really talking about motherhood? The first – crucial to the quality of any scientific discussion – question is whether the woman, who was pregnant and subsequently gave birth to a child, can be described as "mother" under the legal systems that use this term to describe the legal solution (e.g. in birth/civil status record), when another woman is legally recognized as the primary mother (the one who acquired such a primary legal status via contract). Maybe the more precise term should be surrogate "birth" or "giving birth"? (or "surrogate uterus", "surrogate womb").

Under the legal systems that have introduced the so-called "surrogate motherhood" may occur a kind of competing with the alternative rule as regard to the child, i.e. the legal status of the woman who gave birth to the child and the legal status of person contracting with the surrogate. Non-pregnant woman has been legally described as primary "mother" or "parent 1 or 2". Single persons and homosexual couples become treated as "creators" of a child and registered in birth records as the primary legal parents filiation. So the child – as a result of this legal fiction in the birth records – comes from the constellations of people in which the conception and pregnancy is in general not possible. These systems may *de facto* affect the global scale, e.g., through exporting and importing the legal effects between different states.

[2] *The Code of Justinian* (*Corpus Iuris Civilis*): "Mater semper certa est, etiamsi uolgo conceperit, pater uero is est, quem nuptiae demonstrant" (II, 4, 5).

Specific problems concern the understanding of the principle of good/welfare of child, in particular, the choice between individual (*hic et nunc*) evaluation of a given child and the general long term perspective of the children in the society. The latter seems *prima facie* to be correct as far as the general effect (affect) of jurisprudence of international tribunals is concerned.

In addition, it can be observed that the current broad definition of the so-called "surrogacy motherhood" (e.g., "[a] woman agrees for money to carry a child for the intending parent(s) and relinquishes her parental rights following the birth"[3]) in fact is close to the fact of sale and purchasing a human being. Speaking precisely, the acquirement (most often – *via* non-altruistic contract) not only of the child but also of its legal origin and the legal status of the parent (filiation). In my opinion, we as researchers cannot – during planning and conducting scientific research – overlook the reality of the application of law. In order to be familiar with "the law in action" (by the way – this is precisely the title of a peer-reviewed journal edited by the Institute of Justice), we should also be familiar with current press and electronic media commentaries on the social and political reality. Such a situation raises a series of fundamental and legal problems that are engagingly discussed in the present book.

The preliminary research on several legal systems leads also to the conclusion that the evolution of the so-called "surrogacy motherhood" has created a number of fundamental problems and in-depth studies have become urgent. The origins of those problems lie in strongly differentiated legal systems concerning filiation (maternity and paternity) and civil status registration and criminal law, as well as concept of infertility treatment including actual situations not logically relevant from fertility concept, i.e., single person and same-sex (in practice: homosexual) contractors, that could be described by the words: surrogacy that *naturam non imitatur*.

4. The need for a complex research methodology

The progressive complex character of the topic results in the necessity of a comprehensive approach and a general methodological assumption that the topic should be studied and discussed not in the limited scope of one branch of law, as it has been usually presented in the literature so far, but in a more complex way. The subject

[3] See: working documents of the Hague Conference of Private International Law, https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy (last accessed: 18 November 2018).

matter requires studies from the perspective of humanities and the social sciences, in particular, in relation to various areas of law. Restricting the researches only to, for example, international, private or penal law would not present the diverse, intricate and multidimensional nature of the subject under study.

These observations resulted in the research being organized and based on a comparative analysis of the issue of surrogate motherhood and a multidisciplinary discussion of the issue in question, i.e., from the perspective of the constitutional, criminal, civil, and family law and civil registration. There is a need for the organization and systematization of the terminology and the preparation of possible actions under civil and criminal law to protect fundamental principles of the domestic legal order (e.g. aiming to support the prohibition of trafficking in children and to counteract the evasion of the adoption process). The procedures allowing surrogacy differ as to the conditions (e.g. as to the genetic link with the child) and effects of the surrogacy agreements (e.g., on civil status, or on financial restitution). On the other hand, the procedures prohibiting surrogacy are interesting from the perspective of many legal systems evaluating it negatively. Not only legal but also philosophical, sociological, and ethical aspects are of paramount importance. Of course, a comprehensive examination of the issues leads to a better diagnosis of the current legal situation and the reality based on it, and moreover – to a more correct answer to the question whether it is necessary to take any legal or political measures, e.g., ones of a protective or penal character.

Having in mind the reality (which in fact is going on)[4] – i.e. not only the legal but also the current political situation in the world – the fundamental issues related to the topic in question can be thoroughly studied and discussed. As a result, numerous essential questions are duly raised, putting the debate into the perspective of philosophy, sociology, anthropology, and theory of law. The key purpose is to study and understand domestic legal systems with focus on their fundamental principles – *de facto* grounds of (non)acceptance in substantive laws and (non)recognition of foreign civil status registration. We should take also into consideration both the constitutional and international legal foundations of filiation (child's origin, maternity and paternity), parents-child relationship, and human dignity. Current activities on

[4] The current reality is illustrated, for example, by the following websites: a service provided by a Ukrainian center: http://biotexcom.com/information/brief-explanation-surrogacy-process (last accessed: 14 November 2018); organization of a fundraiser for the acquisition of a child in South Africa by a Dutch homosexual couple: www.babyrainbow.nl (last accessed: 14 November 2018).

supranational level are of great importance so the surrogate motherhood as a subject matter of recent actions on international or federal level should be also considered.

The next research goal was to identify problems originated in public law. In particular, combating child trafficking, e.g., ban on "payment or compensation of any kind" under Article 4.d.4 of the Hague Adoption Convention (1993) and illegal "surrogacy business". This topic includes also criminal law, which is applied not only in the states completely prohibiting it, but also in legal systems which to some extent allow it (in fact, there is always some restricted extent and penalization of the activities and operations crossing the borders and territories of states). This includes also certain problems of criminal law, including difficulty to specify the prohibited activity and assign its connections to different areas of law.

The details and results of the so-called "surrogate motherhood" are the subject of great interest of substantive private law, in particular, family law. In many countries, for example, in Poland, France and Italy, the foreign law on surrogacy motherhood can be even evaluated as remaining in opposition to the domestic principles of substantive private law (maternity and paternity, civil status registration, adoption, freedom of contracts, unjustified enrichment).

It should be additionally noticed that the surrogate motherhood occurs quite often in cross-border situations. The problems raised in such circumstances are the subject matter of private international law and international civil procedure, which is the perspective from which I personally started studies on the topic. Luckily, some months or years have passed since: before the project could start I have matured intellectually and come to the conclusion that the studies and project should be carried out from a much broader perspective.

5. The first detailed questions identified as research topics

Shaping the research content in a complex way allows participating scholars to achieve a set of different goals. The first one is to research and try to describe what is legally and actually occurring in select states in the world under the name of "surrogacy motherhood" (including the growing surrogacy business and "child acquisition tourism"), as well as – if such a need appears – to propose terminology that precisely reflects the contents of different phenomena called in this way (e.g. to classify the different and – in my opinion – non-comparable situations described in scholarship under this one umbrella term). This part of research includes the

proposal of terminology and definitions that are precise and suit the current developed legal solutions and practice, as well as proposals to abandon the terminology that is misleading. The second one is to present and evaluate various legal solutions and facts (including growing differences between surrogacy models) from the perspective of philosophy, sociology and different branches of law (including law of international relations, constitutional law, private law, criminal law). The third one is to present conclusions *de lege lata*, i.e., a general assessment of the development of law and reality at the beginning of 21st century (in particular, from the perspective of human dignity, child trafficking, child's and woman's dignity and child's identity, as well as current trends in some societies), including the assessments from the conclusions of studies on different branches of law. The fourth one, as domestic laws are concerned, is to present arguments *de lege ferenda*, including substantial law and private international law solutions (including *ordre public* clause, effecting in the non-acceptance of effects of foreign law), arguments for/against probable future postulates of introducing or spreading the concept of "surrogacy motherhood agreements" in internal law or recognizing the effects of foreign procedures. The fifth goal is to evaluate or propose, if necessary, the future actions on international level, for example, recently proposed on the forums of Council of Europe and Hague Conference of Private International Law[5], or of opposite purpose, e.g. international agreement on non-recognition of foreign law, judgments, civil status records in all or some surrogacy cases, as well as international activities aiming at international police co-operation.

The comprehensive approach to the topic makes it easier to ask relevant questions and provide correct answers. In my opinion, there are several, identified during initial studies multidisciplinary questions that ought to be asked and tackled comprehensively. The most important fundamental and legal issues to discuss can be summarized by the following detailed questions:

What is the redefined and broadened content of legal solutions to the so-called "surrogate motherhood"?

Can the current state of play be critically evaluated as: (1) back to the future (despite the abolition of slavery) plus assisted reproductive technologies (including in

[5] See: https://assets.hcch.net/upload/wop/gap2015pd03b_en.pdf (last accessed: 19 November 2018), http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=23015&lang=en (last accessed: 19 November 2018); https://eclj.org/surrogacy/pace/gpa--vote-final-au-conseil-de-leurope (last accessed: 19 November 2018); https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy (last accessed: 19 November 2018).

vitro fertilization using material from donors) and (2) "asexual innovations" (delivering children to single persons and same-sex couples)?

Are the classifications and definitions adopted decades ago still useful in research and debate in the second decade of the 21st century?

Are, as the discussed examples show, human rights protected in action or is the protection now defunct?

Are the results of surrogacy motherhood an example of overt circumventing the prohibition of trade or trafficking of human beings? Do they indirectly violate the rules of human beings identity and constitute an unfair competition with the adoption system?

Are modern technologies and the redefinition of surrogate motherhood de facto in the service of child trafficking?

Are the ideas of unifying legal systems (with a positive or a negative answer) at international level possible and sensible in the era of totally different domestic laws?

What kind of roles will international law, jurisprudence of tribunals, and domestic private international law play in the future?

Will accepting by the tribunals some effects as exception in 'individual cases" lead to the danger of the general (law-making) effect of such a – de facto general – judgment?

Is it coherent and consistent to evaluate surrogate motherhood negatively in accordance with internal (regional) law and simultaneously to accept the effects of procedures that took place abroad?

What are the financial consequences of nullity of agreement and restitution actions when the contract is declared null and void under certain domestic laws?

What should (and is likely to) happen in the future (de lege lata and *de lege ferenda)?*

Does the international agreement on recognition (e.g. proposals discussed under the auspices of the Hague Conference of Private International law) of foreign judgments (birth records) contradict the international agreement on combating child trafficking and exploitation of women?

What kind of domestic or international legal and political measures in criminal law should and can be taken internally and internationally by groups of states refusing or accepting a contract with a surrogate regarding pregnancy, childbirth, and transfer of the child's civil personal status (filiation)?

6. Final remarks

The saying "May you live in interesting times" is sometimes reported as being of ancient Chinese origin, sometimes as of contemporary North American origin. According to some authors, it is a blessing, and according to others – it is a curse. Definitely, we are destined to be living in interesting times and have an opportunity to shape the future of the political and legal reality. The book proves that the diversity of phenomena called – *de facto* not precisely – "surrogate motherhood" should be seen not only from the restricted perspective of casuistic cases and particular branches of law, but with a general and long-term approach of all human sciences in mind; it should not be exclusively focused on current issues in internal legal systems but also on a regional and global perspective. Hence the importance of not only internal public law and private substantive law, but also of international private law and civil procedure, international criminal law and procedure, as well as international principles of human rights' protection and European police cooperation. It is only through comprehensive and complex studies that a reliable assessment of the fundamental legal problems of the discussed phenomenon is possible.

Finally, I would like to express hope that the participants in the discussion and readers of this book will in the future not only observe the above-mentioned processes, but also have arguments for shaping the legal instruments and law-making judiciary in compatibility with fundament ethical principles and human dignity as well as with non-casuistically perceived welfare of women, best interest of children, families and the human society at large.